PREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 401

JAMES ROBERTSON,

Petitioner,

versus

M/S SANYO MARU, Her engines, tackle, apparel and furniture, and SAWAYAMA KISEN, K.K.,

Defendants,

versus

TEXLA STEVEDORING COMPANY,

Third-Party Defendant.

OPPOSITION TO WRITS OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN BEHALF OF SAWAYAMA KISEN, K.K. AND TEXLA STEVEDORING COMPANY.

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May It Please The Court:

NOW COME Sawayama Kisen, K.K., as owners and claimants of the S/S SANYO MARU, and Texla Stevedoring

Company, and file this opposition to petition for certiorari by James Robertson, petitioner.

I.

SUMMARY STATEMENT OF THE CASE

This petition for a writ of certiorari by petitioner longshoreman is directed toward a judgment affirming an adverse judgment on liability from the District Court of the Eastern District of Louisiana rendered by the Honorable Alvin B. Rubin. This district judgment was the second judgment adverse to the petitioner, which was entered following the second trial of the same facts. At the first trial, District Judge Frank B. Ellis entered judgment against the petitioner after hearing all of the evidence on liability and held that the petitioner had failed to sustain his burden of proof. The Fifth Circuit Court of Appeals, however, reversed this decision in *James Robertson v. M/S SAYO MARU, her engines, tackle, apparel and furniture and Sawayama Kisen, K.K.* (No. 22-865) (5th Cir. 1967), 374 F.2d 463, on the sole question of an original statement not having been introduced into evidence.

On the second trial, this original document was filed in evidence and was therefore not at issue in the second appeal to the Fifth Circuit. Following a hearing on all of the evidence in the second trial, the Honorable Alvin B. Rubin entered judgment against the petitioner on liability and held that the petitioner had failed to sustain his burden of proof.

Following the second trial, the petitioner sought reversal of this second adverse judgment on liability by urging that the

finding of facts were clearly erroneous and maintained that the operational negligence which he brought into play created, as a matter of law, an unseaworthy condition.

Two separate trials on the same facts have resulted in identical conclusion of fact which have been the basis of both adverse judgments to the petitioner and these were simply that the petitioner had failed to sustain his burden of proof that the vessel was unseaworthy or that the shipowner was negligent.

In the present application for writs of certiorari, the sole and only issue raised is whether the operational negligence found by the Court for which the petitioner was responsible by operation of law resulted in unseaworthiness of the defendant's vessel for which the petitioner can recover damages. The petitioner has stated that the issue in this case is whether or not the joint negligence of two longshoremen resulting in injury to one of them is operational negligence which would be equated with unseaworthiness. Specifically, the petitioner has stated the issue as "whether or not the joint negligence of two longshoremen, which resulted in the injury of one of them, resulted in unseaworthiness." It is submitted that the statement that the negligence resulted in unseaworthiness is not consistent with the factual findings of the District Court which specifically held that the petitioner failed to sustain his burden of proving by a preponderance of the evidence that the vessel was unseaworthy. Therefore, unless the factual finding is clearly erroneous, the petitioner must rely on unseaworthiness resulting "as a matter of law" and not solely from the facts proven in the second trial.

It is quite clear from the District Court's decision that as a matter of fact, there was joint negligence of the petitioner and his co-worker but there was no finding that the vessel was

unseaworthy. In this petition, the petitioner attempts to reach the legal conclusion of the vessel's unseaworthiness, without any factual support, through a legal manipulation of the decision of *Mascuilli v. United States* and subsequent cases.

II.

OPERATIONAL NEGLIGENCE IS NOT PER SE UNSEAWORTHINESS AND THERE WAS NO NEGLIGENCE OR UNSEAWORTHINESS

Each case depends on the facts submitted to and found by the trial judge. Counsel for petitioner attempts to interpret the case of *Mascuilli v. United States*, 387 U.S. 237, 87 S. Ct. 1705, 18 L.ed 743 (May 22, 1967) so that any form of operational negligence creates unseaworthiness. This theory has not been accepted by even the Second Circuit as the per curiam decision shown in the petition for rehearing in *Candiano v. Moore-McCormack Lines, Inc.*, 386 F.2d 444 (2nd Cir. 1967) wherein the court discusses the present status of the law and indicates that an unseaworthy condition was created prior to the accident thereby changing their original interpretation of *Mascuilli*. In the instant case there is no unseaworthy condition which was created.

Further, this court has consistently denied certiorari in cases involving operational negligence and has allowed the circuit courts decision (and the trial courts decision) to remain undisturbed.

After the *Mascuilli* decision, which was decided on May 22, 1967, this court denied a petition for rehearing on October

9, 1967, in *Foster v. Lykes Bros. SS Co.*, 389 U.S. 889, 88 S. Ct. 15. On June 5, 1967 (two weeks after the *Mascuilli* decision) the Second Circuit's opinion in *Fenton v. I/S Glittre*, 370 F.2d 146 (2nd Cir. 1966) this court denied petition for writs of certiorari, 387 U.S. 944, 87 S. Ct. 2077. Petition for writ of certiorari to review this court's decision in *Infoine v. Lake Charles Stevedores, Inc.*, 376 F.2d 443 (5th Cir. 1967) was denied on October 9, 1967, 389 U.S. 869, 88 S. Ct. 145. Further, a petition for writ of certiorari to review the decision in *Dugas v. Nippon Yusen Kaisha*, 378 F.2d 271 (5th Cir. 1967 was denied on December 18, 1967, 389 U.S. 1021, 88 S. Ct. 592. In the last mentioned case this court permitted the filing of an amicus curiae brief by the American Trial Lawyers Association which specifically urged the court to reverse Dugas on the basis of *Mascuilli* but this court refused to grant certiorari.

We therefore respectfully submit that the court should similarly deny certiorari in this case which, in effect, would confirm this court's decision in *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S. Ct. 926, 4 L.ed 2d 941 (1960) wherein the court provided that the ship owner does have a duty to provide a seaworthy vessel, and that this is an absolute duty, but further held that a vessel has a duty only to furnish a vessel and appurtenances reasonably fit for their intended use.

CONCLUSION

It is apparent that after two trials wherein the Court heard all of the evidence on liability, two separate District Courts have held that the petitioner has failed to maintain his burden of proving that the vessel was unseaworthy. Through an effort to read conclusions into the *Mascuilli* case, the petitioner seeks by

this writ of certiorari to have this Court alter the findings of fact and thereby carry for him his burden of proving that the vessel was unseaworthy.

A similar effort was made in the case of *Mose Reed v. M/V FOYLEBANK, her engines, tackle, apparel and furniture, and Bank Lines Limited and Strachan Shipping Company*, No. 894 of this Court, which this Court denied certiorari on the 24th day of February, 1970.

For the above and foregoing reasons, it is respectfully submitted that the petitioner's writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I certify that on this day I have served copies of the foregoing brief in opposition to petition for writ of certiorari on all counsel of record by mailing a copy thereof, postage prepaid, addressed to their respective offices, this ____ day of August, 1970.

PAUL A. NALTY